Supreme Court, U.S.
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No. 98-766

In the Supreme Court of the United States

OCTOBER TERM, 1998

MARK STAFFORD ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 545, which punishes one who "knowingly and willfully, with intent to defraud the United States, * * * makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper," requires the government to prove that the defendant intended to deprive the United States of money or property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 147 F.3d 851. A related opinion of the court of appeals rejecting other contentions raised by petitioner (Pet. App. 10a-18a) is unpublished, but the decision is noted at 152 F.3d 931 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1998. A petition for rehearing was denied on August 31, 1998. Pet. App. 19a. The petition for a writ of certiorari was filed on November 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to smuggle merchandise into the United States through the use of false invoices, to receive the same merchandise, and to engage in money laundering, in violation of 18 U.S.C. 371 (Count 1); three counts of making out and passing through the customhouse false and fraudulent invoices, in violation of 18 U.S.C. 545 (Counts 2-4); three counts of receiving merchandise that had been brought into the United States contrary to law, in violation of 18 U.S.C. 545 (Counts 5-7); nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i) (Counts 8-16); 24 counts of engaging in monetary transactions in property derived from unlawful activity, in violation of 18 U.S.C. 1957 (Counts 17-40); and three counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 42, 44, and 46). Petitioner was sentenced to 121 months' imprisonment, to be followed by three years of supervised release, and was fined $75,000. He was also ordered to forfeit $1.9 million.

1. In 1990, petitioner and Bradley Hirou were co-owners of Fusion International Trading, Inc. (Fusion). As the president and majority owner of Fusion, petitioner had final decision-making authority over all financial matters. Pet. App. 3a-4a; Gov't C.A. Br. 7.

In the spring of 1990, Hirou contacted Stephen Pecqueraux, the majority owner of High Tech Trading (HTT), a company located in France. HTT bought and sold used IBM AS-400 processor cards and feature cards.[1] After Hirou determined that Fusion could sell

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[1] IBM computers contain at least one processor card and several feature cards. The processor card determines the processing

cards to customers, petitioner and Pecqueraux agreed that Fusion would purchase three processor cards from HTT. In June 1990, petitioner took delivery of the three processor cards in Paris, put them in his suitcase, and brought them to San Diego, California, without declaring them to United States Customs. Pet. App. 4a; Gov't C.A. Br. 8-9.

Later that month, Fusion purchased 14 additional IBM cards from HTT for $500,000. Petitioner again traveled to France, where he and Pecqueraux hid the IBM cards in the back of a computer. Petitioner agreed to pay Pecqueraux through a Swiss bank account in order to avoid paying United States taxes and customs duties and to allow Pecqueraux to avoid paying French taxes. Petitioner and Pecqueraux traveled to Switzerland, where each set up a foreign corporation to be used to create false invoices. Pet. App. 4a; Gov't C.A. Br. 9-11.

In July 1990, Pecqueraux arranged to export IBM cards from France to Fusion in the United States through CSC Computer Sales and Leasing, Inc. (CSC), a New York business that had an import license for the IBM cards. CSC subsequently acted as the importer of record for computer parts sold by HTT to Fusion. To avoid the assessment of customs duties on Fusion's purchases, HTT sent false invoices to CSC that understated the value of the computer parts sold to Fusion. Pet. App. 4a-5a; Gov't C.A. Br. 11-12.

In August 1990, Fusion received the computer in which petitioner and Pecqueraux had hidden the 14

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capability of the computer, and the feature cards perform routine computer functions. At the time, a processor card for AS-400 computers sold for $19,000 to $229,000, depending upon the processing capability of the card. Pet. App. 4a n.1; Gov't C.A. Br. 7-8.

IBM cards. The 14 cards were not listed on any invoice presented by CSC to the United States Customs Service. Fusion sold the cards to Sun Data, a company in Atlanta, Georgia, for $623,000. After receiving payment from Sun Data, Fusion wired its payment to HTT to Pecqueraux's Swiss bank account. Pet. App. 5a; Gov't C.A. Br. 12-13.

Shortly thereafter, Fusion agreed to purchase 43 IBM cards from Pecqueraux for $1.36 million. HTT sent a false invoice to CSC that listed the purchase price of the IBM cards as $9,000, and CSC sent a false invoice to Fusion that listed the purchase price as $10,000. Fusion sold the 43 IBM cards to Sun Data for $1.6 million. After receiving payment from Sun Data, Fusion wired its payment for the cards to Pecqueraux's Swiss bank account. Pet. App. 5a; Gov't C.A. Br. 13-14.

Several months later, Fusion agreed to purchase 554 computer IBM cards from Pecqueraux for $1.8 million. HTT sent a false invoice to CSC that listed the purchase price as $27,000, and CSC created a false invoice showing that it sold the cards to the foreign corporation set up by petitioner for $30,500. Petitioner and Hirou arranged to sell the computer cards to Americomp, but the transaction was not consummated. Petitioner and Hirou then sold 423 IBM computer cards to Sun Data for $2.1 million. They subsequently transferred $2.3 million to their Swiss bank account. Pet. App. 5a-6a; Gov't C.A. Br. 14-17.

During this time, petitioner and Hirou paid $72,356 for a Porsche automobile for Pecqueraux and $1.3 million for a home in Rancho Santa Fe, California, for Pecqueraux. Soon thereafter, the market for IBM AS-400 computer cards declined substantially. Pet. App. 6a; Gov't C.A. Br. 16-17.

2. Counts 2, 3, and 4 of the indictment charged that petitioner, with intent to defraud the United States, made out and passed through the customhouse false and fraudulent invoices, in violation of 18 U.S.C. 545.[2] Petitioner contended that, by using the phrase "intent to defraud the United States," Section 545 punishes only one who intends to deprive the United States of customs revenue. He therefore requested that the district court instruct the jury that, to convict him on Counts 2, 3, and 4 charging violations of Section 545, the jury was required to find that petitioner intended to deprive the United States of revenue. He also requested a jury instruction that the jury was required to find him not guilty on those counts if it found that he honestly believed that no customs duty was owed on the computer cards.[3] The district court refused to give petitioner's requested instructions. Instead, the court instructed the jury that the element of "intent to defraud" required an "intent to deceive or to cheat." Pet. 7; Pet. App. 7a.

3. The court of appeals affirmed. Pet. App. 1a-9a. Following circuit precedent, *United States* v. *Boggus*, 411 F.2d 110 (9th Cir.), cert. denied, 396 U.S. 919 (1969),

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[2] In pertinent part, Section 545 provides:

> Whoever knowingly and willfully, with intent to defraud the United States, * * * makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper * * * [s]hall be fined under this title or imprisoned not more than five years, or both.

[3] At trial, petitioner testified in his own defense that he knew that the false invoices allowed Pecqueraux to avoid French taxes, but he claimed that he did not intend to avoid the payment of U.S. customs duties because he believed that the computer cards were duty-free and legally admissible into the United States. Pet. 6.

the court rejected petitioner's claim that the district court erred in refusing to instruct the jury that the government was required to prove an intent to deprive the government of revenue to obtain a conviction under Section 545. Pet. App. 6a-9a.

The court acknowledged that the Third Circuit had held in *United States* v. *Menon*, 24 F.3d 550 (1994), that "intent to defraud" under Section 545 required an intent to deprive the government of revenue. As the court explained, the *Menon* decision had relied on the fact that the predecessor statute to Section 545 had been construed to required an intent to deprive the government of revenues, and had also held that Congress did not intend any substantive change when it deleted the references to revenue from the statutory text. Pet. App. 7a-8a. The court below also observed, however, that the phrase "defraud the United States" has generally been construed (by this Court among others) to extend beyond defrauding the government of revenue. *Id.* at 8a (citing *McNally* v. *United States*, 483 U.S. 350, 359 n.8 (1987)). It therefore concluded that "the intent to defraud element of [the] statute should be construed as meaning intent to avoid and defeat the United States Customs laws, as construed in *Boggus*, rather than the narrower construction 'intent to deprive the United States of revenue.'" *Ibid.* The court further observed that its decision is in accord with the Second Circuit's decision in *United States* v. *Borello*, 766 F.2d 46 (1985), and the Seventh Circuit's decision in *United States* v. *Kurfess*, 426 F.2d 1017, 1019, cert. denied, 400 U.S. 830 (1970). Pet. App. 8a-9a.

ARGUMENT

Petitioner contends (Pet. 7-24) that the term "intent to defraud" in the first paragraph of 18 U.S.C. 545 requires an intent to deprive the government of money or property, as opposed to an intent to deceive the government (for example, by fraudulently depriving it of useful information in the administration of the customs laws). The court of appeals, consistent with two of the three other circuits that have addressed the issue, correctly rejected that contention. Further, although the Third Circuit has reached a contrary result, it may reconsider its decision in light of this Court's intervening decision in *United States* v. *Wells*, 519 U.S. 482 (1997). The Third Circuit relied heavily on assertions by the 1948 Revisers to the United States Code that they intended no substantive change to Section 545 when they removed a reference to defrauding "the revenue of" the United States in that statute. *Wells* makes clear, however, that such assertions by the Revisers cannot prevail over the plain language of Section 545. Further review is therefore not warranted.

1. The court of appeals correctly held that the element of "intent to defraud the United States" in Section 545 does not require proof of intent to deprive the government of revenue. This Court has consistently interpreted statutes prohibiting an act done with intent "to defraud the United States" not to require an intent to injure the government financially. Thus, the Court has long held in cases arising under 18 U.S.C. 371, which prohibits conspiracies "to defraud the United States," that a showing of intent to cause pecuniary harm to the United States is not required. In *Hammerschmidt* v. *United States*, 265 U.S. 182, 188

(1924), this Court explained that "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful functions by deceit, craft or trickery, or at least by means that are dishonest." See also *Dennis* v. *United States*, 384 U.S. 855, 861 (1966); *Haas* v. *Henkel*, 216 U.S. 462, 480 (1910). The most natural reading of Section 545, therefore, is that the prohibited "intent to defraud the United States" may include in intent to obstruct the government's enforcement of the customs laws (by, for example, depriving the government of information needed to enforce those laws), and is not limited to an intent to deprive the government of customs revenue.

McNally v. *United States*, 483 U.S. 350 (1987), does not suggest a different conclusion. In that case, the Court held that mail fraud convictions under 18 U.S.C. 1341 could not be based on the theory that a public official's conduct had deprived citizens of their intangible right to honest and impartial services by their government officials. The Court held (483 U.S. at 356-360) that the right to honest services did not fall within the meaning of "property" as defined in Section 1341.[4] Although the Court held in *McNally* that the mail fraud statute was "limited in scope to the protection of property rights," *id.* at 360, the Court expressly distinguished *Hammerschmidt* and similar cases by noting

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[4] After this Court's decision in *McNally*, Congress enacted 18 U.S.C. 1346, which now provides that, for purposes of the mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

that, whereas Section 371 "is a statute aimed at protecting the Federal Government alone[,] * * * the mail fraud statute * * * had its origin in the desire to protect individual property rights." *Id.* at 359 n.8. Like Section 371, Section 545 is "a statute aimed at protecting the Federal Government alone[.]" *Ibid.* Consequently, *McNally* has no bearing on the issue presented in this case.

There is likewise no merit in petitioner's argument (Pet. 13-15) that the court of appeals' decision conflicts with *United States* v. *Cohn*, 270 U.S. 339 (1926). That case involved a statute that punished one who "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, * * * shall knowingly and willfully * * * make * * * any false or fraudulent statements or representations." In holding that the statute did not reach false statements made to a customs collector when the purpose of the statements was not to deprive the government of money or property, the Court concluded that because the word "defrauding" was "used in connection with the words 'cheating or swindling,' * * * it is to be construed in the manner in which those words are ordinarily used, as relating to the fraudulent causing of pecuniary or property loss."[5] *Id.* at 346-347. The Court distinguished its interpretation of Section 371 (which does not refer to "cheating or swindling") in *Hammerschmidt* on the ground that "the language of the two

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[5] Congress subsequently amended the statute construed in *Cohn* to remove "the restriction to cases involving pecuniary or property loss to the government." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); see also *Brogan* v. *United States*, 118 S. Ct. 805, 813-814 (1998); *United States* v. *Yermian*, 468 U.S. 63, 70-71 (1984).

statutes [was] * * * so essentially different as to destroy the weight of the supposed analogy [to Section 371]." *Id.* at 346. Because the language of the false statement statute involved in *Cohn* is likewise "essentially different" from the language of Section 545, *Cohn* is not controlling in this case.

2. Petitioner argues (Pet. 15-24) that the legislative history of Section 545 and the overall statutory scheme establish that Section 545 requires proof of an intent to deprive the government of revenue. As petitioner notes (Pet. 16-17), before the 1948 revision of the United States Code, the predecessor to what is now Section 545 required proof of an "intent to defraud the revenue of the United States." See 19 U.S.C. 1593 (1940). Moreover, the Second Circuit construed that predecessor statute to require proof of an intent to cause "an actual loss of government income." *United States* v. *Kushner*, 135 F.2d 668, 671, cert. denied, 320 U.S. 212 (1943). When Congress revised the Code in 1948, see Act of June 25, 1948, ch. 645, 62 Stat. 683, it deleted the words "the revenue of" from the intent element of Section 545. Petitioner argues, however (Pet. 17-19), that the Reviser's Note to Section 545 and the legislative history concerning the 1948 codification indicate that no substantive change to Section 545 was intended by that revision.

Petitioner's argument is without merit. First, regardless of what the revisers might have said about their intent in proposing changes to the language of Section 545, their comments cannot prevail over the plain language of Section 545, which contains no reference to a requirement of an intent to deprive the government of revenues, but rather uses language—"intent to defraud the United States"—that has long been construed not to be limited to an intent to cause

the government financial harm. See pp. 7-8, *supra*. "Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotations and citations omitted); see also *Salinas* v. *United States*, 522 U.S. 52, 57-58 (1997). Here, the statutory language unambiguously reaches further than an intent to deprive the United States of revenue. The fact that the 1948 Reviser's Note did not expressly indicate that substantive changes were intended in Section 545 does not make the statutory language used by Congress ambiguous. In a similar case involving the effect of a Reviser's Note accompanying the 1948 revisions of the United States Code, this Court recently explained that the mere fact that the 1948 Revisers may have overlooked or chosen to say nothing about a substantive change in their proposed revisions does not, by itself, mean that no such substantive change was effected when the revisions were enacted into law by Congress. See *Wells*, 519 U.S. at 496-497.

Moreover, in this case, like *Wells*, Congress could not reasonably have understood the 1948 revision as making no substantive change. Cf. *Wells*, 519 U.S. at 497. When the Second Circuit construed the predecessor to Section 545 in *Kushner*, it placed significant weight on the fact that the statute before it did not flatly punish actions taken with the "intent to defraud" the government, but rather required "an intent to defraud *the revenue of* the United States." 135 F.2d at 671 (emphasis added). Although the *Kushner* court found the reach of the statute "not free from doubt,"

ibid., it concluded that the additional reference to "the revenue of" the United States distinguished the case before it from cases like *Haas* v. *Henkel*, *supra*, which construed statutory language referring to a purpose "to defraud the United States" to reach broadly to an intent to prevent the government from exercising its lawful functions (rather than merely an intent to cause it financial harm, see *Kushner*, 135 F.2d at 671). Indeed, the *Kushner* court affirmed one of the defendant's convictions, which rested on another part of the statute that prohibited "fraudulently or knowingly" importing matter into the United States contrary to law, and did not require a purpose to defraud "the revenue of the United States," *id.* at 672. Moreover, the *Kushner* court endorsed (*id.* at 671- 672) Judge Augustus Hand's decision in *United States* v. *Twenty-Five Pictures*, 260 F. 851 (S.D.N.Y. 1919), which had also relied on *Haas* v. *Henkel* to conclude (*id.* at 854) that "[t]o deprive the United States of the information it was entitled to * * * was to defraud the United States."

The law before the 1948 revisions to the United States Code therefore made clear that the predecessor statute to Section 545 required an intent to deprive the government of revenues *only* because the statute contained an express reference to such revenues, and did not refer generally to an intent "to defraud the United States." When Congress in 1948 deleted the words that the Second Circuit had found crucial, it could not reasonably have believed that that deletion would have no substantive effect. Rather, the deletion did have the substantive effect of removing any requirement that the government prove that the defendant had a purpose to deprive the government of revenue.

For similar reasons, petitioner's reliance on the rule of lenity (Pet. 20) is misplaced. "The mere possibility of articulating a narrower construction [of a statute] does not by itself make the rule of lenity applicable." *Smith* v. *United States*, 508 U.S. 223, 239 (1993). Further, the rule of lenity is "not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], * * * such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks and citations omitted); see also *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998); *Welis*, 519 U.S. at 499; *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). Because the language of Section 545 is not ambiguous, the rule of lenity is inapplicable in this case.

3. As petitioner points out (Pet. 7-13), two of the other three circuits that have addressed the question have agreed with the Ninth Circuit that Section 545 requires proof only of an intent to avoid and defeat the customs laws, and not proof of an intent to deprive the government of revenue. See *United States* v. *Borello*, 766 F.2d 46, 51-52 (2d Cir. 1985); *United States* v. *McKee*, 220 F.2d 266, 269 (2d Cir. 1955); *United States* v. *Kurfess*, 426 F.2d 1017, 1019 (7th Cir.), cert. denied, 400 U.S. 830 (1970); see also *United States* v. *Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982); *United States* v. *Boggus*, 411 F.2d 110, 113 (9th Cir.), cert. denied, 396 U.S. 919 (1969). On the other hand, the Third Circuit held in *United States* v. *Menon*, 24 F.3d 550, 557 (1994), that Section 545 "requires an intent to cause a deprivation of property or money." The Third Circuit relied on the Reviser's Note accompanying the 1948 revision to Section 545, which indicated that no

substantive change had been intended by the deletion of the words "the revenue of" from the statute. That legislative history, the court concluded, made "the meaning of 'defraud the United States' in § 545 ambiguous given that * * * the meaning of defraud varies from statute to statute." *Ibid.*

For the reasons discussed above, the Third Circuit's view that Section 545 requires proof of an intent to deprive the government of revenue is incorrect. The Reviser's Note to Section 545 simply will not bear the weight that the Third Circuit placed on it. Moreover, after the Third Circuit's *Menon* decision, this Court made clear in *United States* v. *Wells*, *supra*, that a Reviser's Note to the 1948 Code, indicating that no substantive change was intended by an alteration in statutory language, cannot prevail over the plain language of a statute enacted by Congress in 1948 as part of that revision. When presented with the opportunity, the Third Circuit may well reconsider its ruling in *Menon* in light of this Court's decision in *Wells*. In addition, the conflict among the circuits does not at present appear to involve an issue of great importance in the administration of federal criminal law, for only a handful of cases have addressed the issue in the 51 years since the codification of the criminal code in 1948. Accordingly, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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